(13)

No. 93-141

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993.

WEST LYNN CREAMERY, INC., and
LECOMTE'S DAIRY, INC.,
Petitioners,

v.

JONATHAN HEALY, COMMISSIONER OF THE
MASSACHUSETTS DEPARTMENT OF
FOOD AND AGRICULTURE,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF MASSACHUSETTS

RESPONDENT'S BRIEF ON THE MERITS

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Question Presented.

Does a Massachusetts order requiring milk dealers to make payments to a state trust fund based upon the amount of fluid milk they sell for consumption in Massachusetts and providing for a subsidy to Massachusetts dairy farmers violate the interstate Commerce Clause?

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RESPONDENT'S BRIEF ON THE MERITS

Massachusetts, like several other States, has adopted laws to avert the crisis affecting dairy farming within its borders, which threatens to diminish or destroy the economic, social, environmental and educational benefits of dairy farms. The petitioners' contention that these laws violate the dormant Commerce Clause, if successful, would impair the State's ability to serve its citizens by preserving these benefits.

Relevant Constitutional, Statutory and Administrative Provisions.

The Constitution of the United States, Art. 1, § 8, cl. 3, provides in relevant part:

> The Congress shall have the Power . . . To Regulate Commerce . . . among the several States . . . .

Massachusetts General Laws, chapter 29, § 2V (1992), provides:

> There shall be established and set up on the books of the commonwealth a separate fund to be known as the Dairy Equalization Fund. There shall be credited to such fund all monies payable pursuant to sections ten, eleven and twelve of chapter ninety-four A and any interest earned on monies within the fund. Amounts credited to said fund shall be made available by the state treasurer, without further appropriation, exclusively for the purposes of said chapter ninety-four A, only after receipt of notice certified by the commissioner of the department of food and agriculture that amounts are due pursuant to said chapter ninety-four A. Said commissioner shall file quarterly reports with the house and senate clerk and the house and senate committees on ways and means regarding the distribution of monies from the fund.

The amended pricing order (the "Milk Order") issued by the Massachusetts Commissioner of the Department of Food and Agriculture ("Commissioner") on February 26, 1992, is reproduced in the Joint Appendix ("J.A.") at 32-40, except that the

date of the original order of February 18, 1992, is incorrectly reproduced as February 18, 1991, on page J.A. 40.[1]

Statement.

A. *The Massachusetts Milk Order.*

1. Findings and Adoption of the Order.

On January 28, 1992, after extensive hearings, the Commissioner declared a state of emergency in the Massachusetts dairy industry (J.A. 26, 30-31). He determined that a price stabilization program was necessary because rising production costs and flat (and recently declining) dairy prices were devastating the industry (J.A. 28; see also J.A. 13, 16, 20-21).[2] As the report of the Governor's Special Commission noted, 434 Massachusetts dairy farms—or roughly half of the dairy farms in the Commonwealth—went out of business between 1980 and 1991 (J.A. 13).[3] An analysis presented at the Commissioner's hearings predicted that:

> [W]ithout immediate price stabilization, the state will lose over one third of its remaining dairy farms during the next year. On the other hand, the

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[1] Compare the photocopy of the Order in the Joint Appendix filed with the Supreme Judicial Court of Massachusetts ("SJC A.") at page 535.

[2] For example, while the average blend price per hundredweight ("cwt") of milk paid Massachusetts dairy farmers in 1991 was $12.64, the farmers' average production cost was over $15.00/cwt, resulting in an average loss of over $2.00 per cwt (J.A. 27).

[3] The Commissioner expressly incorporated the Special Commission's report to the Massachusetts Legislature in his report (J.A. 27).

> report also predicts that, with price stabilization, over eighty percent of those farmers will remain in productive agriculture.

(J.A. 28). The Commissioner determined that this "crisis threatens a cornerstone of our state's agricultural industry" (J.A. 30). He concluded that:

> [W]e must act on the state level to preserve our local industry, maintain reasonable minimum prices for the dairy farmers, thereby ensure a continuous and adequate supply of fresh milk for our market, and protect the public health.

(J.A. 31).

The citizens of the Commonwealth derive numerous benefits from the continued existence of Massachusetts dairy farms. The dairy farms encompass nearly 300,000 acres of well maintained open land in Massachusetts (J.A. 18). That land provides wildlife habitat that is protected from development and often available for recreation such as horseback riding, snowmobiling, skiing, hunting and fishing (J.A. 18). Without the dairy farms, Massachusetts will lose "the open lands that are used as wildlife refuges, for recreation, hunting, fishing, tourism and education" (J.A. 13). Moreover, loss of the dairy farms would threaten the infrastructure of related agricultural businesses, including farm equipment sales, feed stores, artificial insemination services and farm credit institutions (J.A. 19-20).

The Commissioner issued the initial Milk Order on February 18, 1992 (see above, p. 3), and amended it on February 26, 1992 (J.A. 40). The Order is to "provide an immediate interim solution

to the state of emergency facing the Massachusetts dairy industry" (J.A. 32).[4]

2. Operation of the Milk Order.

The Order applies to all milk dealers engaged in the handling of milk within the Commonwealth (J.A. 32, Part II.A).[5] It contains three essential features, to which this brief refers as the Milk Assessment, the Milk Subsidy and the Dairy Equalization Fund.

The Order requires all milk dealers, wherever located, to make monthly payments into the Fund with respect to their sales of Class I (*i.e.*, fluid) milk in the Commonwealth (the "Milk Assessment"). "Every dealer . . . is subject to payment into the Massachusetts Dairy Equalization Fund based on the initial sale of Class I milk in Massachusetts" (J.A. 35, Part V.A).[6]

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[4] The Order continues in effect, although the petitioners have recently argued (incorrectly) that the Order expired as a matter of law on February 17, 1993. See Plaintiffs' Motions for Summary Judgment at 1 (September 23, 1993) served in *West Lynn Creamery, Inc.* v. *Healy, Commissioner*, No. 93-3914-B (Suffolk Superior Court) (judicial review of Commissioner's decision dated June 11, 1993); *LeComte's Dairy, Inc.* v. *Healy, Commissioner*, No. 93-3923-B (Suffolk Superior Court) (same).

[5] The Order defines "dealer" as "any person who is engaged within the Commonwealth in the business of receiving, purchasing, pasteurizing, bottling, processing, distributing, or otherwise handling milk, purchases or receives milk for sale as the consignee or agent of a producer, and shall include a producer-dealer, dealer-retailer, and sub-dealer" (J.A. 32-33, Part II.A).

[6] To ensure that only one payment is made with respect to any particular milk, the Order excludes "sales to another Massachusetts licensed dealer" from the amount to be reported (J.A. 34, Part IV.B(1); see also J.A. 35, Part V.A).

The Assessment does not depend upon the price actually paid for the milk. Rather, it is one-third of the difference between $15 and the applicable federal blend price per hundredweight (J.A. 35, Part V.B(1)).[7] The dealers' payments are determined by multiplying this "order premium" by the amount sold for Class I utilization in the month (J.A. 36, Part V.B(2)). The payments are due with the monthly reports on the 25th of each month (J.A. 34, Part IV.A).

The Order then provides for subsidies to Massachusetts dairy farmers (the "Milk Subsidy"). The Commissioner "shall direct that monthly distributions from the Fund are made by the fifth (5th) day of each month" to "every Massachusetts producer based upon their proportion of milk produced in Massachusetts . . . " (J.A. 36, Part VI.A).[8] The farmer may receive a monthly subsidy only for up to 200,000 pounds of production (J.A. 36, 37, Parts VI.A(1),(3)).

If the total of all Milk Assessments in a given month exceeds the total Milk Subsidy, the Order requires that rebates of all excess assessments "be distributed directly to the licensed

[7] The Federal blend price is determined by the Secretary of Agriculture and represents the weighted average of the Federal minimum prices for the various classes of milk based on sales for the month (with certain adjustments). See 7 U.S.C. § 608c(5)(B)(ii). *E.g.*, 7 C.F.R. 1001.62. The Order bases the premium on the Federal blend price in Zone 21 of Federal Milk Marketing Order No.1 for the second preceding month, (J.A. 35, Part V.B(1)), because that is typically the most recent information available.

[8] The Order defines "producer" as "any person producing milk from dairy cattle" (J.A. 33, Part II). The amount "produced" is actually the amount of milk produced and *sold* by Massachusetts dairy farmers in any given month (J.A. 34-35, Parts IV.B(2), IV.C).

dealers, based upon each dealer's proportionate contribution to the total fund . . . " (J.A. 37, Part VI.C, see J.A. 58).[9]

Allaying milk dealers' "concerns over the funds being deposited into a state account for redistribution and not paid directly to the farmers" (J.A. 22), the Order also established the Massachusetts Dairy Equalization Fund ("Fund") (J.A. 35, Part V.A). In April 1992, the Massachusetts Legislature enacted, and the Governor approved, legislation establishing the Fund on the books of the Commonwealth. See Mass. St. 1992, c. 23, § 7, adding Mass. Gen. Laws c. 29, § 2V. Under the statute, amounts credited to the Fund are made available by the State Treasurer, without further appropriation, after receipt of notice certified by the Commissioner. *Id.*

The Order finally provides for enforcement by administrative proceedings. In the event that a dealer "fails to pay the amounts owed in accordance with this Order, or fails in any other way to comply with the terms of this Order, the Department shall conduct a hearing in accordance with M.G.L. c. 94A section 6, to determine if suspension or revocation of the license is warranted" (J.A. 38, Part VII.A).

B. *The License Revocation Proceedings.*

The petitioners are both located and incorporated in Massachusetts (J.A. 45, 98, 103). At administrative license revocation hearings on September 14, 1993, they conceded that they had failed to make payments under the Milk Order (J.A. 57, 64).

They also presented the testimony of the state senator and state representative from the electoral districts that include Lynn,

[9] No part of the Fund is used for purposes other than distributions to farmers or rebates to dealers. (J.A. 37, Part VI.B).

Massachusetts, the town where West Lynn has its principal place of business (see J.A. 56; SJC A. 386-404). West Lynn's president, Arthur J. Papathanasi also provided testimony and an affidavit (J.A. 56, 65). Finally, West Lynn presented an affidavit by an expert, Dr. Ronald D. Knutson (J.A. 57, 68).

Papathanasi testified that West Lynn "absorbed roughly 50 percent of the tax that is being assessed" (J.A. 58). While it had tried to "pass on" the premiums imposed by the Order to its customers, West Lynn was able to pass on only 50 percent (J.A. 58). Papathanasi provided no information concerning any changes in West Lynn's prices or sales; he noted only that its margins were "eroding" (J.A. 58, 67).

In the Knutson affidavit, which West Lynn offered without supporting testimony, the affiant theorized that the assessments placed on milk dealers and the subsidies to Massachusetts farmers under the Milk Order had several effects on interstate commerce. These contentions were rejected by the Commissioner, as discussed below pp. 9-10.

C. *The Commissioner's Revocation Decisions.*

After finding that the milk dealers had violated the Milk Order by failing to make required payments, the Commissioner rejected their Commerce Clause defense (J.A. 87-89, 94-96). He concluded, first, that:

> [t]he Order is applied even handedly to all milk dealers, wherever located, handling milk for sale in Massachusetts. The Order does not discriminate among dealers based on the source of the milk they purchase or the amount of milk they sell in other states.

(J.A. 88, 94-95). Turning to the dealers' allegation of discrimination between in-state and out-of-state farmers, the Commissioner noted that the Order "does not limit the amount of Class I milk imported into Massachusetts" (J.A. 88, 95). He found that the Order "does not provide dealers, or consumers, with any incentive to purchase milk from Massachusetts producers as opposed to out-of-state producers" (J.A. 88, 95).

The Commissioner considered and rejected the milk dealers' claim that the Order may affect the price received by out-of-state farmers beyond the federal minimum price (J.A. 88, 95). He noted that the dealers' argument assumed that Massachusetts farmers will increase their production and found that the assumption was "not supported by the record" (J.A. 88, 95). While the Knutson affidavit asserted that the Order would cause an increase in production by Massachusetts farmers, (J.A. 71), the evidence in the record showed that Massachusetts production had actually declined since implementation of the Order in April, 1992 (J.A. 82). The Commissioner concluded that the contention was:

> speculative, given the uncertain duration of the Order, the time, facilities, workload, and initial investment involved to increase a herd size, and the fact that the Order places a cap on the amount of monthly payments to producers.

(J.A. 89, 95).[10] The Commissioner likewise rejected, as not supported by the record, the dealers' claim that any increase in Massachusetts milk production would cause a decline in payments to out-of-state farmers (J.A. 89, 95).

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[10] The Special Commission found that Massachusetts producers already had increased their production significantly by 1991, *before* the Milk Order was adopted, in some cases by 20 percent or more (J.A. 21).

The Commissioner found that the record did not support the dealers' claim that they would be harmed by a reduction in the demand for milk due to a rise in retail prices (J.A. 89, 96). The dealers did not offer any evidence of an increase in the retail price. The only evidence concerning actual retail prices was Knutson's assertion that "[p]rior to the imposition of the tax," the retail price of milk in Massachusetts "generally ranged from about $1.99 per gallon to $2.49 per gallon" (J.A. 71). Given such a large variation in the retail price per gallon before the Order, consumers might not notice a small increase from the assessment (see J.A. 18). Moreover, West Lynn, at least, absorbed about one-half of the cost of the assessment (J.A. 58) so any increase in the retail price would be greatly reduced.[11]

Based upon his findings, the Commissioner conditionally revoked the petitioners' milk dealers licenses (J.A. 89, 86).

D. *The Opinion of the Supreme Judicial Court of Massachusetts.*

The petitioners each filed an action in the Massachusetts Superior Court challenging the Commissioner's license revocation decisions (J.A. 98-107). These actions were reserved and reported to the Massachusetts Appeals Court pursuant to Mass. R. Civ. P. 64 (J.A. 6, 7). The Appeals Court consolidated these actions with the petitioners' appeal from the denial of preliminary relief in their separate action, brought under 42 U.S.C. § 1983 (J.A. 6-8, 44-54). The consolidated appeal was transferred, *sua sponte*, to the Massachusetts Supreme Judicial Court (J.A. 8).

[11] Knutson's calculation of reduced demand due to a "tax" of $0.07 per gallon is not explained and is based on the assumption that the entire assessment is passed on to consumers (J.A. 80).

The Supreme Judicial Court held that the Milk Order "does not discriminate on its face, is evenhanded in its application and only incidentally burdens interstate commerce" (J.A. 126). After examining the method of determining the premium payments under the Order, the court concluded that the Order does not establish a minimum price that milk dealers must pay for milk regardless of point of origin because the dealers' premium is *independent* of both the price the dealer pays and the source of the milk. The assessment is "fixed only by the Massachusetts target price, the federal minimum price and the amount of milk the dealer sells in Massachusetts" (J.A. 127). Accordingly, the Order did not manifest any preference for in-state milk over out-of-state milk (*id.*). "[M]ilk dealers have every reason to seek out the lowest unit price for milk as it will reduce their costs" (J.A. 127). The Court concluded—as had the Commissioner (J.A. 88)—that the Order did not provide milk dealers an incentive to purchase milk from in-state farmers rather than from out-of-state farmers (J.A. 127).[12]

The Court rejected the dealers' argument that the limitation of Fund distributions to Massachusetts farmers burdened interstate commerce because it would cause Massachusetts production to increase (J.A. 127). Expressly relying on the Commissioner's findings at the initial public hearings and citing to the Commissioner's findings in the administrative proceedings, the Court rejected the dealers' assumption that the distributions would be sufficient to "expand and develop" the Massachusetts dairy industry (J.A. 128 & n.13). It held that the distributions to

[12] The Court noted in closing that the assessments might have detrimental financial impacts on milk dealers, but that those impacts do not "run afoul" of the Commerce Clause. Rather, they are "one of the costs of doing business in the Commonwealth, a cost all milk dealers must pay" (J.A. 130).

Massachusetts farmers under the Order represented only an "infusion of capital designed solely to save an industry from collapse" (J.A. 128). The Court concluded that the limitation of distributions to Massachusetts dairy farmers was only an incidental burden on interstate commerce outweighed by the local benefits (J.A. 128). It remanded the cases to the Superior Court "for action not inconsistent with [its] opinion" (J.A. 130).

Summary of Argument.

1. The Milk Order furthers the legitimate state purposes of saving the Massachusetts dairy farming industry from collapse and preserving the economic, environmental, social, educational, and other benefits of dairy farming. These are legitimate state purposes and are not protectionist. Several other factors disprove protectionist intent. First, the burden of the Milk Order falls extensively upon Massachusetts consumers and businesses. Second, the Milk Assessment does not depend upon the origin of milk or upon the residence of the milk dealer who pays. Third, it resembles legislation in other states that are net exporters of milk.

2. The Milk Order achieves its lawful goals by lawful means. It has three essential elements.

First, the Milk Order supports dairy farming directly by subsidizing Massachusetts farmers. States may grant monetary subsidies to businesses even if, in doing so, they add to the market forces that drive decisions of private businesses. The absence of a subsidy for out-of-state farmers is entirely consistent with decisions of this Court upholding similar subsidies. Compared to most subsidies, the Milk Subsidy has less potential for adverse effect upon interstate commerce, because farmers desperately need funds to pay off farm debt and to increase investment. Price reduction by farmers due to the subsidy,

though lawful, is therefore unlikely. The Constitution does not compel official indifference to the loss of local dairy farming that would result from the petitioners' *laissez-faire* theories.

Second, the Milk Assessment collects funds to pay the subsidy through an evenhanded charge that applies to all milk sold for consumption in Massachusetts. In adopting funding measures, the States are not limited to levies upon goods produced in-state—which would place in-state goods at a disadvantage solely because of the state assessment. Rather, States may adopt laws like the Milk Assessment that assess in-state and out-of-state goods equally. It is no objection that the costs of both in-state and interstate business are increased by such a measure. Nor is the Milk Assessment unlawful because of the Milk Subsidy. Subsidies go toward milk production, not to the processing operations of milk dealers who pay the assessments. The production and the processing segments of the milk industry are not in competition with each other in any relevant respect. In the absence of unequal treatment of dealers who are liable for the assessment, the Milk Assessment is not discriminatory.

Third, the Commonwealth has created a Fund within its Treasury (Mass. Gen. Laws c. 29, § 2V) for the purpose of receiving assessments and paying subsidies pursuant to the Milk Order. Petitioners concede that subsidies from the State's general fund would be lawful, but challenge the use of the special Fund. The Fund serves important governmental purposes by allaying fears expressed by milk dealers during the legislative process "that the money [from the Milk Assessment] will be deposited into the general fund and appropriated for other uses" (J.A. 22-23). Use of such a fund does not implicate the goals of the Commerce Clause to create a federal free trade zone but is an important legislative option. Examination of particular accounting mechanisms used to raise and spend money would expand

Commerce Clause jurisprudence into entirely new areas and would impair the States' ability to fashion effective programs.

The Milk Order does not constitute extraterritorial price regulation proscribed by *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). Under the Order, out-of-state farmers are free to ship milk in such amounts and at such prices as they please, subject to federal price *minima*. If consumed in Massachusetts, in-state and out-of-state milk share an equal burden under the Milk Assessment, which does not depend upon the price actually paid by dealers to farmers. Far from an extraterritorial price, this arrangement is lawful under *Henneford* v. *Silas Mason Co.*, 300 U.S. 577, 586 (1937). The petitioners' real complaint is not that out-of-state prices are regulated, but that their own costs are (quite lawfully) increased.

3. Subsidies and evenhanded assessments are not subject to balancing under *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970). Nevertheless, the Commonwealth's interests in preserving its dairy farms outweighs any incidental effects of the Milk Order. Petitioners failed to prove adverse effects on commerce below, and, in any event, such effects would not exceed the usual effects of a lawful in-state subsidy and a non-discriminatory levy. No equally effective alternative with lesser impact on commerce exists. Massachusetts' efforts to preserve its dairy farms therefore comport with the Commerce Clause.

Argument.

Petitioners seek to invalidate Massachusetts law (and to recover under 42 U.S.C. § 1983), based upon negative implications drawn from the Commerce Clause, U.S. Const. Art. I, § 8, cl. 3. "The principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce." *CTS Corp.* v. *Dynamics Corp. of America*, 481 U.S. 69, 87 (1987). If a state law discriminates against interstate commerce on its face or in practical effect, then the State must "demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Maine* v. *Taylor*, 477 U.S. 131, 138 (1986) (quoting *Hughes* v. *Oklahoma*, 441 U.S. 322, 336 (1979)). In addition, under the usual dormant Commerce Clause doctrine—which may not even apply to the Order (see below, p. 40)—a non-discriminatory state law is valid under the Commerce Clause unless it imposes burdens upon interstate commerce that are "clearly excessive in relation to the putative local benefits." *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The Milk Order is lawful under these tests. Designed to prevent the loss of dairy farming in Massachusetts, the Milk Order has the same purpose as numerous state laws that this Court has upheld under the Commerce Clause. The means chosen are likewise lawful, consisting of a subsidy, an evenhanded assessment and a dedicated revenue fund in the state treasury.

I. THE ORDER SERVES LAWFUL PURPOSES WITHOUT UNLAWFUL DISCRIMINATION.

The Commissioner found that the Milk Order "is applied even handedly to all milk dealers, wherever located, handling milk for sale in Massachusetts," "does not discriminate among dealers based on the source of the milk they purchase or the amount of milk they sell in other states," is "based solely on the amount of Class I milk the dealer sells in Massachusetts" and "does not limit the amount of Class I milk imported into Massachusetts" (J.A. 88, ¶¶ 21, 22; J.A. 94-95, ¶¶ 20, 21). Notwithstanding these findings, relied upon by the Massachusetts Supreme Judicial Court, 415 Mass. at 17 & n.13, 611 N.E. 2d at 244 & n.13 (J.A. 128 & n.13), the petitioners claim that the Milk Order has protectionist purposes and effects. The record amply refutes that claim.

A. *The Purpose of the Order, To Save an Industry From Collapse, Is Not "Protectionist."*

The Supreme Judicial Court found that the "infusion of capital" into dairy farming pursuant to the Milk Order was "designed solely to save an industry from collapse." 415 Mass. at 17, 611 N.E.2d at 244 (J.A. 128). The petitioners attempt to characterize this intent as "protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Wyoming* v. *Oklahoma*, 112 S. Ct. 789, 800 (1992) (quoting *New Energy Co. of Indiana* v. *Limbach*, 486 U.S. 269, 273-74 (1988)) (quoted in Petitioners' Brief on the Merits ("Pet. Br.") at 14). Their argument is wrong for several reasons.

In the first place, one of the very cases cited by the petitioners on this point recognizes that States may enact laws "that have the purpose and effect of encouraging domestic industry." *Bacchus*

Imports, Ltd. v. *Dias*, 468 U.S. 263, 271 (1984). See *Metropolitan Life Ins. Co.* v. *Ward*, 470 U.S. 869, 876-77 n.6 (1985); *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 36 (1980); *Parker* v. *Brown*, 317 U.S. 341, 367 (1943). See also subsidy cases cited below, pp. 21-22. The Milk Order addresses the undisputed "crisis" in dairy farming which "threatens a cornerstone of our state's agricultural industry" (J.A. 27, 30). See above pp. 3-5. Not only do local dairy farmers produce fresh milk, but they preserve hundreds of thousands of acres of open lands "that are used as wildlife refuges, for recreation, hunting, fishing, tourism, and education" (J.A. 13). The benefits of agriculture to the general public have become all the more apparent as farms are lost in an increasingly urban and suburban state like Massachusetts. The Milk Subsidy is thus designed "to reach a domestic situation in the interest of the welfare of the producers and consumers of milk" in Massachusetts. See *Milk Control Bd.* v. *Eisenberg Farm Products*, 306 U.S. 346, 352 (1939). "[T]he label 'protectionism' [is] of little help" as applied to "the essential and patently unobjectionable purpose of state government—to serve the citizens of the State." *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 442 (1980).

Second, the operation of the Order disproves any claim of protectionism. The impact of the Milk Assessment falls extensively upon Massachusetts interests. The Assessment affects only milk consumed in Massachusetts, so that *only* in-state consumers feel the effect of any retail price increase that dealers and retailers may pass through to the consumer. The dealers themselves, who absorb some of the costs of the assessment (see J.A. 58-59, 67), have a substantial in-state presence. Though not thoroughly explored in the record, that presence is exemplified by the petitioners, both of which are Massachusetts corporations with principal places of business in Massachusetts (J.A. 85, 92, 98, 103). West Lynn portrayed itself as a major Massachusetts

employer (J.A. 66, 101). The petitioners' attempt to describe the Assessment as falling on "out-of-state milk" (Pet. Br. at 16, 24) ignores the obvious fact that, while milk may originate in other states or in Massachusetts, the Assessment is paid by Massachusetts interests.

As Massachusetts companies, the petitioners must look to the political process for protection from any adverse effects on their business. Commerce Clause scrutiny is at its weakest when powerful in-state interests are affected by the challenged state regulation. See *Goldberg* v. *Sweet*, 488 U.S. 252, 266 (1989); *Kassel* v. *Consolidated Freightways Corp. of Delaware*, 450 U.S. 662, 675 (1981); *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 473 (1981). In this case, the political power of West Lynn, at least, is far from hypothetical: the state senator and state representative from West Lynn's district both spoke at length in West Lynn's favor during the hearing before the Commissioner on license revocation (SJC A. 386-404).

Third, the petitioners' claim of harm to out-of-state interests is contrary to fact. Their brief has abandoned their economic arguments, which were rejected by the Commissioner (see above pp. 9-10) and by the Supreme Judicial Court. 415 Mass. at 17, 611 N.E.2d at 244 (J.A. 127-28). Instead, they rely upon an erroneous characterization of the Order in an attempt to show harm to out-of-state interests (Pet. Br. at 25 & n.21). Their argument shows only that a dealer's purchase of out-of-state milk neither reduces nor increases the amount of the dealer's *assessment*. *Id.* at 25 n.21. Any local pricing advantage of out-of-state farmers is unaffected by the Order. For instance, if an out-of-state farmer has a price advantage and is willing to receive the federal minimum price while a Massachusetts farmer seeks to negotiate a price of $1 above the federal minimum, the Milk Order preserves this $1 price differential and the resulting incentive for milk dealers "to seek out the lowest unit price for milk."

415 Mass. at 16, 611 N.E.2d at 244 (J.A. 127).[13] It is true that the dealer must pay an assessment, equal in amount regardless of the milk's origin, if the milk is to be consumed in Massachusetts. This in no way diminishes the out-of-state farmer's $1 per hundredweight price advantage.[14]

Fourth, the petitioners asserted below that the Milk Order will cause some milk consumers to purchase more milk from out-of-state sources (J.A. 74). The Supreme Judicial Court noted that, by raising the costs of doing business in Massachusetts, the Order "may have the unintended adverse effect of reducing the economic viability of milk dealing in Massachusetts," but that such impacts "do not . . . run afoul of the commerce clause." 415 Mass. at 19, 611 N.E.2d at 245 (J.A. 130). This impact rebuts any claim that Massachusetts is discriminating against interstate commerce, for it tends to show that, if the Order has any uneven aspect to it at all, it creates a greater incentive for consumers to purchase milk *outside* Massachusetts than within the Commonwealth.

Finally, evidence of lack of protectionist purpose lies in the diversity of interests in states that—without being large net importers of milk—adopted similar laws prior to the 1992

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[13] Two principles relating to this example are discussed below. First, the crisis in the Massachusetts dairy industry makes it unlikely that farmers would use the Milk Subsidy to reduce prices, rather than to invest and pay off debt (see below, p. 24). Second, even if some price reduction were subsidized (with potential benefits for consumers), that possibility inheres in concededly lawful subsidy programs and is not "protectionist" (see below, pp. 24, n.20).

[14] Petitioners' restatement of the Milk Order (Pet. Br. at 25) seems to imply that there is an increased assessment when lower-priced milk is purchased. That is not true, since the assessment is not based upon the purchase price of the milk, but upon the federal blend price. See above, p. 6.

Massachusetts Order.[15] Massachusetts, Minnesota and New York (and Vermont, at least as to its legislature), with their differing positions in the milk production and consumption markets, enacted similar laws with a similar, constitutionally valid purpose.

For all these reasons, the general purpose of the Milk Order is not protectionist. See generally *Clover Leaf Creamery*, 449 U.S. at 471-72.

B. *The Milk Order Achieves Its Goals Through Lawful Means.*

The lawfulness of the Milk Order's purpose having been established, the next question is whether the Order achieves the Commonwealth's legitimate purposes through lawful means. See *Wyoming*, 112 S. Ct. at 801. The means at issue here are the Milk Subsidy, the Milk Assessment and the Dairy Equalization Fund. The next three sections of this brief demonstrate that these provi-

[15] Such states include a net exporting state (Maine, see Me. Rev. Stat. Ann. tit. 36, § 4541 (West 1992), enacted by 1991 Me. Laws ch. 526, amended and extended by 1993 Me. Laws ch. 104, § 2, and 1993 Me. Laws ch. 274, §§ 3-5), a state with both large production and large consumption (New York, see N.Y. Agric. & Mkts. Law, § 258-m (Consol. Laws Supp. 1993), as amended by 1991 N.Y. Laws ch. 84; N.Y. Comp. Codes R. & Regs. tit. 1, pt. 22 (1991)) and a Midwestern production state (Minnesota, see Minn. Stat. Ann. § 32A.071 (West Supp. 1993), enacted by 1992 Minn. Laws ch. 602, superseded by Minn. Stat. Ann. § 32.73, enacted by 1993 Minn. Laws ch. 65). See also Brief of Cumberland Farms, Inc. as *Amicus Curiae* at 13. Though not cited in its *amicus* brief in this Court, Vermont, another export state, enacted statutory authority to implement such an order (see Vt. Stat. Ann. tit. 6, §2924(e) (West Supp. 1993), enacted by 1991 Vt. Laws No. 232 (Adj. Sess.), §9), although it apparently has not implemented this statute.

sions have the same purposes and effects as lawful assessments (or taxes) and subsidies upheld by this Court.

1. The Subsidy To Massachusetts Farmers Does Not Violate The Commerce Clause.

Funds received under the Milk Order are paid into a fund on the books of the Commonwealth, from which the State Treasurer (not the Department of Food and Agriculture, see Pet. Br. at 28) disburses subsidies pursuant to the Milk Order. Mass. Gen. Laws, c. 29, § 2V. The limitation of these subsidies to Massachusetts farmers is lawful under the Commerce Clause.[16]

This Court has stated:

> The Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description *in connection with the State's regulation of interstate commerce*. Direct subsidization of domestic industry does not ordinarily run afoul of that prohibition; discriminatory taxation of out-of-state manufacturers does.

Limbach, 486 U.S. at 278 (emphasis in original) (discussing Indiana cash subsidy for in-state ethanol producers).

Although the petitioners attack the Milk Order as a whole, they virtually concede the legality of limiting subsidies to in-state residents. They propose that "the state could subsidize its in-state dairy producers without violating the Commerce Clause" by, for example, "provid[ing] dairy farmers with tax subsidies from the Commonwealth's general tax fund . . ." (Pet. Br. at 32). Accord,

[16] Their argument that the distributions are not real "subsidies" is addressed below at 30-35.

Brief of the Milk Industry Foundation ("MIF") *et al.* as *Amici Curiae* at 26.[17]

A number of authorities support the principle that the States may subsidize local industry, without also subsidizing out-of-state companies.[18] For instance, Maryland may affect the market by paying a "bounty" to licensed in-state businesses that destroy any abandoned automobile formerly titled in Maryland. *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 797, 809-10 (1976). "Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Id.* at 810 (footnote omitted). Concurring in *Alexandria Scrap*, Justice Stevens observed that "the Commerce Clause surely does not impose on the States any obligation to subsidize out-of-state business" and that "a cash

[17] *Amicus* Vermont granted cash subsidies to certain Vermont dairy farmers in the recent past. See Vt. Stat. Ann. tit. 6, §§ 2991 *et seq.* (West 1988) (effective May 19, 1988 through April 30, 1989), repealed by 1991 Vt. Laws 79, § 7. States promote the dairy industry with public funds in other ways. See, *e.g.*, Cal. Food & Agric. Code, Div. 22, c. 1, § 64181 (West 1986) (Dairy Council of California Law); N.Y. Agric. and Mkts Law, Art. 21-AA, § 258-aa (Consol. Laws Supp. 1993) (Dairy Promotion Act); Vt. Stat. Ann. tit. 6, § 2951 (West Supp. 1993) (separate "Vermont dairy promotion fund"); Vt. Stat. Ann., tit. 6, § 2964 (West Supp. 1993); Code Vt. Rules 20011004 (Weil 1993) (Vermont "Seal of Quality").

[18] *See South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U.S. 82, 95 (1984) (Opinion of White, J.) (implicitly accepting subsidies to in-state timber processors); *Zobel* v. *Williams*, 457 U.S. 55, 67-68 (1982) (Brennan, J., concurring). Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 Mich. L. Rev. 395, 473-75 (1989); Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1193-1202 (1986).

subsidy . . . should not be characterized as a 'burden' on commerce." *Id.* at 815-16.[19]

In *Alexandria Scrap*, the State made payments on a per-hulk basis and was "a purchaser, in effect, of a potential article of interstate commerce" even though it did not acquire legal title to the automobile hulks. *Id.* at 808. See also *id.* at 824 (Brennan, J., dissenting). Massachusetts, too, is a "purchaser, in effect" and, like Maryland, is acting to preserve aesthetic values and quality of life for all its citizens. The Milk Order pays a fixed amount per hundredweight of milk, subject to a cap based upon volume. Like the Maryland payments, the Milk Subsidy incontestably comes from funds collected by the Commonwealth at significant local expense, whether that be the increase in milk prices for Massachusetts consumers as alleged by the dealers or the increased costs borne by Massachusetts dealers like the petitioners themselves. See Regan, *supra*, 84 Mich. L. Rev. at 1201. See also below, p. 27, n.23. If Massachusetts may not subsidize farmers to counteract the adverse social, economic, educational and environmental consequences of the failure of the market to sustain farming in the state, then a broad range of state welfare and spending programs may be called into question.

[19] While it has been argued that there are some, legally irrelevant, respects in which "subsidies resemble tariffs," the fact remains that (1) "for at least formal reasons, subsidies are *always* different from tariffs," (2) subsidies "present visible preferences of one in-state constituency over another" and thus may encounter legislative resistance and (3) identifying the rare, truly dangerous subsidy is unmanageably difficult. Coenen, *supra*, 88 Mich. L. Rev. at 478-79. "The traditional tolerance of subsidies is also important," for people have come to rely upon States' ability to subsidize and may "perceive subsidies as fair interstate competition and not as a point of special offense . . . ." Gergen, *The Selfish State and the Market*, 66 Tex. L. Rev. 1097, 1134-37 (1988).

The Milk Order has an even more benign impact upon interstate commerce than most subsidies, since it has been found necessary to preserve commerce generated by a Massachusetts dairy industry that is in danger of collapse. 415 Mass. at 10, 11 & n.8, 17, 611 N.E.2d at 240, 241 & n.8, 244 (J.A. 29-31, 121 n.8, 128). The need to pay off farm debt and to invest reduces the likelihood that the subsidy will be devoted to price reductions by dairy farms (see J.A. 21-22).[20] Moreover, land is unique, so that any attempt to preserve open space in Massachusetts through an agricultural subsidy program *must* be directed toward Massachusetts farmers. The decision not to subsidize out-of-state farmers, particularly in these circumstances, is entirely lawful.

While the petitioners at bottom urge that the market should be permitted to diminish or eliminate dairy farming in Massachusetts, the Commonwealth is not bound to accept *laissez-faire* principles or any other "particular economic theory." *CTS Corp.*, 481 U.S. at 92. See Regan, *supra*, 84 Mich. L. Rev. at 1096-97, 1124. It may attempt to counter the "pressures of creeping urbanization." See Brief of *Amicus Curiae* Vermont at 15. The States' attempts to prevent decimation of local dairy farms do not conflict with the national policy of promoting an interstate common market.

[20] Such price reductions (subject to federal *minima*) would, themselves, be an entirely lawful effect of subsidies, since the farmers' decisions would result from "market forces, including that exerted by money from the State." *Alexandria Scrap*, 426 U.S. at 810.

2. The Assessment Upon All Milk Consumed In Massachusetts Is Evenhanded and Lawful.

Obviously, the subsidies to farmers must be funded. The purpose of the Milk Assessment is plain: to raise funds from the sale of milk consumed in Massachusetts, wherever that milk was produced. The Milk Assessment comports with the Commerce Clause because "the Commerce Clause is not offended when state boundaries are economically irrelevant" to a state assessment, as here. See *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266, 283 (1987) (state vehicle registration fee). The petitioners contend, however, that the Assessment is discriminatory. They appear to argue (Pet. Br. at 16, 23) that the Commonwealth adopted the Milk Assessment, rather than an in-state minimum price, in order to avoid loss of business to dairy farmers from other states. They urge that a State may impose *only* those in-state minimum prices or other measures that, by their nature, raise the cost of local goods, but not of out-of-state goods.

The argument that States can only impose laws that place in-state goods at a disadvantage was rejected in *Henneford*, 300 U.S. at 586.[21] In *Henneford*, this Court upheld a use tax, imposed upon goods purchased outside of Washington state, in the same amount as the sales tax applicable to in-state purchases.[22] The

[21] As Justice Cardozo noted in *Henneford*, "motives alone will seldom, if ever, invalidate a tax that apart from its motives would be recognized as lawful. Least of all will they be permitted to accomplish that result when equality and not preference is the end to be achieved." 300 U.S. at 586 (citations omitted).

[22] Regan, *supra*, 84 Mich. L. Rev. at 1192 n.194, discusses *Henneford* among the movement-of-goods cases, because "*Henneford* involves a tax, but it does not involve the national interest in avoiding multiple taxation which makes tax cases special."

Court upheld the use tax, because Washington treated in-state and out-of-state goods equally, even though the state's tax system had the same effects that are alleged to be discriminatory here:

> One of its effects must be that retail sellers in Washington will be helped to compete upon terms of equality with retail dealers in other states who are exempt from a sales tax or any corresponding burden. Another effect, or at least another tendency, must be to avoid the likelihood of a drain upon the revenues of the state, buyers being no longer tempted to place their orders in other states in the effort to escape payment of the tax on local sales.

Henneford, 300 U.S. at 581. The Court held that these effects were consistent with the Commerce Clause and rejected the notion that "[c]atch words and labels, such as the words 'protective tariff'" apply to such a tax. *Id.* at 586. See also *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 331-32 (1977).

So here, the petitioners' characterization of the nondiscriminatory assessment upon milk consumed in Massachusetts as a tariff or other protectionist measure must fail. The Assessment neither discriminates against interstate commerce nor imposes any burden upon the act of importation itself. Massachusetts indisputably would have the authority to impose a tax on sales of milk for consumption in Massachusetts. See *International Harvester Co.* v. *Dep't of Treasury*, 322 U.S. 340, 349 (1944). Under *Henneford*, 300 U.S. at 581, it would be lawful to impose an additional tax on the use (or consumption) of all milk in Massachusetts not otherwise taxed (including interstate milk) even if, as a result, out-of-state companies lost the advantage they would have had if only Massachusetts companies were subject to the tax. Such a tax would not be protectionist, because it would not create an advantage for Massachusetts competitors; it would

only remove a disadvantage created by the sales tax. See Regan, *supra*, 84 Mich. L. Rev. at 1246-47. The fact that Massachusetts has chosen to impose a single assessment upon all milk consumed in-state, rather than a sales tax, with a compensating tax upon use, makes no difference for Commerce Clause purposes.[23]

The States' "independent and uncontrollable authority to raise their own revenues for the supply of their own wants" (The Federalist No. 32 (Hamilton)) has repeatedly been held sufficient to justify an evenhanded levy upon all goods consumed within a State even if the products originated in interstate commerce. See *Goldberg*, 488 U.S. at 259-65; *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, 46-47 (1940); *Henneford*, 300 U.S. at 586; *Woodruff* v. *Parham*, 75 U.S. (8 Wall.) 123, 140 (1868). This rule serves "to insure the harmonious operation of powers reserved to the states with those conferred upon the

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[23] While the Milk Order does not technically impose a "tax," see, *e.g.*, *United States* v. *Butler*, 297 U.S. 1, 58-59, 61 (1936); *Howes Brothers Co.* v. *Unemployment Compensation Comm'n*, 296 Mass. 275, 284, 5 N.E.2d 720, 726 (1936), cert. denied, 300 U.S. 657 (1937), the economic effect of the Milk Assessment *on interstate commerce* is the same as that of a tax, as even the petitioners' expert conceded (J.A. 70). Under the Commerce Clause, "the critical consideration is the overall effect of the [law] on both local and interstate activity." See *Brown-Forman Distillers* v. *New York Liquor Authority*, 476 U.S. 573, 579 (1986), citing *Raymond Motor Transportation, Inc.* v. *Rice*, 434 U.S. 429, 440-41 (1978). This "critical consideration" does not depend upon whether a particular assessment technically qualifies as a "tax." To establish a distinction between taxes and assessments, for purposes of evaluating at least the questions of discrimination and effect upon commerce, would be to return to the sort of formalism, without grounding in the Commerce Clause itself, that this Court has rejected. See *Arkansas Electric Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 391 (1983) and cases cited. See also *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977).

national government" even if the state law "in some measure affect[s] the commerce or increase[s] the cost of doing it." *McGoldrick*, 309 U.S. at 48. Companies engaged in interstate commerce cannot claim "a privileged position" to avoid paying "their just share of state tax burden even though it increases the cost of doing business." *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 623-24 (1981) (internal quotation marks and citations omitted). Accord *International Harvester*, 322 U.S. at 349.

The petitioners suggest (Pet. Br. at 20-21, 29) that the Milk Assessment upon dealers is discriminatory because it funds a subsidy—granted to a wholly separate level of the industry, namely to farmers. This does not make the Assessment protectionist. The Commonwealth has not imposed a general levy, with exemptions or rebates that reduce the net liability of in-state operations that are assessed. Compare *Tyler Pipe Industries, Inc.* v. *Washington State Dep't of Revenue*, 483 U.S. 232, 240-48 (1987); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 273 (1984); *Halliburton Oil Well Co.* v. *Reily*, 373 U.S. 64 (1963). No Massachusetts subsidy goes to the handling and processing operations of dealers who are liable for the assessment. See *Wyoming*, 112 S. Ct. at 800 ("economic protectionism" refers to burdens on "out-of-state *competitors*") (emphasis added).[24]

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[24] The petitioners and their *amici* have, quite correctly, not raised any issue regarding integrated milk production and processing. They submitted no record evidence of any such operations, and the only milk cooperative discussed in any of their briefs does not process Class I milk subject to the Assessment. See Brief of *Amicus* Vermont at App. 1. In any event, the Milk Order makes the processing operations of "farmer-dealers" fully liable for the Assessment, just like a non-integrated operation. Any subsidy would be paid solely on account of a farmer-dealer's milk production operation, regardless of the location of any processing operations, and would therefore be consistent

(continued...)

There is no discrimination where the subsidized farming operations *do not compete* with the dealers' processing operations. Compare *Alaska* v. *Arctic Maid*, 366 U.S. 199, 204 (1961) (upholding Alaska tax scheme because freezer ships that paid 4% tax upon salmon "do not compete with" local fish processors who paid a 1% tax) and *Parker* v. *Brown*, 317 U.S. 341, 362 (1943) (upholding California system that benefited local raisin growers at the expense of distributors and consumers) with *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 643 n.7 (1984) (invalidating tax where the out-of-state taxpayer and the exempt in-state manufacturers competed "in precisely the same business of wholesaling" in the taxing state). See also Regan, *supra*, 84 Mich. L. Rev. at 1095-96 (noting that "producers (as such) do not compete with distributors (as such) or with consumers (as such)"); Smith, *State Discriminations Against Interstate Commerce*, 74 Cal. L. Rev. 1203, 1225-28 (1986).[25]

It follows that the Milk Assessment is a non-discriminatory means of collecting funds that comports with the Commerce Clause.

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[24](...continued)
with the State's purpose of preserving agriculture and unique open space in Massachusetts.

[25] Professor Varat likewise argues that the Commerce Clause prohibits "subsidizing *the* in-state businesses" that are subject to a particular tax, but counsels against a rule that would "strike down a state expenditure of funds collected for the primary purpose of serving residents, just because the immediate objective of the expenditure is to attract industry, employment, and commercial prosperity to, or to keep it in, the subsidizing state . . . ." Varat, *State "Citizenship" and Interstate Equality*, 48 U. Chi. L. Rev. 487, 541-42, 544-45 & n.205 (1981) (emphasis added).

3. The Linkage Of The Milk Assessment And The Milk Subsidy Does Not Invalidate The Milk Order Under The Commerce Clause.

The petitioners' principal argument appears to be that, in its entirety, the Milk Order violates the Commerce Clause due to the linkage of the Assessment and Subsidy pursuant to Massachusetts statute. Mass. Gen. Laws c. 29, § 2V (1992). First, they claim that the combination of the Assessment and payments to farmers divests the payments of any character as a subsidy (Pet. Br. at 28-31). Second, they claim that, in its entirety, the Milk Order essentially regulates prices paid to farmers for out-of-state milk (Pet. Br. at 17-19, 23-25).

a. Use of a special state fund to collect the assessment and pay the subsidy raises no Commerce Clause issue.

In order to assure that subsidies actually reach dairy farmers, the Commonwealth established the Dairy Equalization Fund within its Treasury.[26] Petitioners concede that an agricultural "subsidy" from the Treasury's general fund would be constitutional but argue in this Court that use of the Dairy Equalization Fund precludes the Milk Subsidy from being a true subsidy (Pet.

[26] Despite the petitioners' protestations to the contrary (Pet. Br. at 29), the general fund of the state treasury consists, in significant part, of monies paid by out-of-state residents. *See, e.g.*, Hellerstein, *Some Reflections on the State Taxation of a Nonresident's Personal Income*, 72 Mich. L. Rev. 1309, 1312, 1318-19, 1322 & n.73 (1974).

Br. at 29, 31, 32).[27] Since the Milk Assessment and the Milk Subsidy are lawful, taken separately, it would be surprising if the dormant Commerce Clause somehow prohibited the state financial structure that combines these two measures. Analysis of the constitutional principles at issue demonstrates that such matters lie outside the scope of the dormant Commerce Clause.

The issue is essentially one of accounting—one that matters to the States but does not implicate national interests in interstate commerce. The Milk Order's accounting provisions serve important interests of the Commonwealth, the farmers and even the milk dealers. As now structured through a segregated account, the funds from the Assessment are strictly limited to the payment of the Subsidy. Any receipts in excess of subsidy expenditures are refunded to the dealers, including petitioners. Eliminating the segregated fund and depositing payments into the general fund would increase the political risk that the money would be used not only for the subsidy program, but also to defray "'the cost of providing *all* governmental services . . . .'" See *Goldberg*, 488 U.S. at 267 (quoting *Commonwealth Edison*, 453 U.S. at 627 n.16). Massachusetts milk dealers cited their fear of this very risk—"that the money will be deposited into the general fund and appropriated for other uses"—in their testimony

[27] Petitioners acknowledged in the Supreme Judicial Court that the Order created a "subsidy." Brief for Plaintiffs-Appellants at 24-26 (Mass. SJC No. 6140). While petitioners do not define "subsidy," the Milk Order easily fits the dictionary definition proffered by *Amici MIF et al.* (Br. at 24)—"a grant of funds . . . from a government . . . to a private person or company . . . as a simple gift or a payment in excess of the usual charges for a service"—a definition that contains no requirement of distribution from the general fund of the State Treasury.

to the Governor's Special Commission (J.A. 22-23).[28] The State's choice of the segregated account system thus assures that the State will keep its promises to dealer and farmer alike.

In contrast to the State's interest in having a segregated fund, the Commerce Clause is simply not concerned with the particular manner in which the State accounts for its receipts and expenditures. State accounting principles do not implicate the purpose of the Commerce Clause "to create an area of free trade among the several States." See *Westinghouse Electric Corp.* v. *Tully*, 466 U.S. 388, 402-03 (1984) (quoting *Boston Stock Exchange*, 429 U.S. at 328); *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 538 (1949). The Commerce Clause "does not authorize Congress to regulate state governments' regulation of interstate commerce" and does not authorize Congress to commandeer the machinery of state government. *New York* v. *United States*, 112 S. Ct. 2408, 2420, 2423 (1992). If Congress, to which the Commerce Clause is expressly addressed, lacks such power,[29] it would be anomalous to hold that the mere negative implication of the Clause places the Court in the position of evaluating the particular machinery the State chooses in order to accomplish its farm subsidy purposes. Just as the Spending Clause "does not mandate a particular form of accounting" and allows Congress to structure

[28] The Massachusetts Legislature did not pass a bill that would have used receipts from Milk Assessments for purposes in addition to a dairy farm subsidy, including the Commonwealth's Women, Infants and Children program and acquisition of agricultural preservation restrictions. See 1991 Mass. House Doc. No. 4390, § 3.

[29] Apart from regulation of the machinery of state government, Congress plainly has the power to enact express legislation prohibiting much, if not all, state participation in the market. *See, e.g., Wisconsin Dep't Of Indus. Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 286-91 (1986).

federal spending through "segregated trust funds collected and spent for a particular purpose," *id.*, 112 S. Ct. at 2426, so the States retain the power under the Commerce Clause to structure their governmental funds and finances in particular ways to accomplish public purposes.[30]

This Court touched upon an analogous issue when it rejected an argument that the payment of fifty percent of Montana's severance tax into a trust fund prevented the tax from being a general revenue tax. Commerce Clause analysis did not turn upon this state fiscal distinction:

> Nothing in the Constitution prohibits the people of Montana from choosing to allocate a portion of current tax revenues for use by future generations.

Commonwealth Edison, 453 U.S. at 621 n.11.

The substantial protection afforded by state political processes pertains when the challenged regulation adversely affects major in-state interests (such as petitioners), even if there is no disbursement from the state treasury at all. See above, p. 18 (citing *Goldberg*, 488 U.S. at 266; *Kassel*, 450 U.S. at 675; *Clover Leaf Creamery*, 449 U.S. at 473). In such situations, this Court has wisely declined to look beyond the overall question of in-state impact to evaluate the efficacy of particular state political mechanisms.

To hold that the validity of the Milk Order turns upon linking an otherwise valid assessment and subsidy through a dedicated fund in the treasury would expand dormant Commerce Clause

[30] Another example of a dedicated revenue fund appears in *McGoldrick*, 309 U.S. at 42, where revenues from the lawful New York City sales tax upon in-state and out-of-state goods consumed in the city were "to be used exclusively for unemployment relief."

jurisprudence into an entirely new area. It would authorize federal scrutiny into the purposes for which the State chooses to collect and disburse funds. This "would threaten the future fashioning of effective and creative programs for solving local problems and distributing government largesse," contrary to the principles of "federalism and good government." *Reeves*, 447 U.S. at 441. Moreover, to make constitutionality turn upon whether subsidies are distributed from the general fund or a dedicated fund would return Commerce Clause jurisprudence to the type of formalism rejected by this Court. See above, pp. 27, n.23. See also *Henneford*, 300 U.S. at 587 (declining to inquire whether the form of a use tax was "a subterfuge" for what was effectively a tax upon a foreign sale).[31]

Questioning the nature of the particular political process involved in each case would create unmanageable problems. There is no constitutional basis for distinguishing the level of deference given to a legislatively authorized state executive milk order, as opposed to a state statute setting up a special fund within the state treasury, as opposed to funding from the state's general fund. All three are equally products of the "Republican Form of Government" guaranteed the states by Article IV,

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[31] Some courts have suggested that *Henneford* does not apply to a milk assessment because the use tax in that case "went to the general coffers of the state, not to the Washington retailers." *Farmland Dairies* v. *McGuire*, 789 F. Supp. 1243, 1252 (S.D.N.Y. 1992). Accord, *Marigold Foods, Inc.* v. *Redalen*, 809 F. Supp. 714, 722 (D. Minn. 1992) (preliminary injunction). But see *Opinion of the Justices*, 601 A.2d 610, 617-619 (Me. 1991); *Cumberland Farms, Inc. v. Lafaver*, D. Me. No. 92-70-P-H (August 3, 1993), appeal docketed, No. 93-2066 (1st Cir.), reproduced in *Cumberland Farms amicus* br. at 22a-32a. These courts offer no rationale for treating assessments and dedicated revenue funds differently from use taxes under the Commerce Clause.

Section 4, of the United States Constitution. Applying different levels of deference would present difficult management and uniformity problems in the numerous state and federal lower courts. The distinction would also create anomalies by invalidating identical state laws based solely upon the State's method of enactment.

It follows that the linkage of the Milk Assessment and the Milk Subsidy, through the Dairy Equalization Fund set up by Mass. Gen. Laws c. 29, § 2V, presents no difficulty under the Commerce Clause.

b. Linkage of the assessment and the subsidy does not constitute extraterritorial price regulation.

Claiming that the Milk Order in its entirety amounts to an extraterritorial pricing scheme, the petitioners also attempt to bring this case within the prohibition described in *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). Since the Milk Order is not an extraterritorial pricing scheme, this claim must fail.

In *Baldwin*, the State of New York had enacted a law prohibiting the sale of out-of-state milk unless "the price paid to the producers was one that would be lawful upon a like transaction within the state." *Baldwin*, 294 U.S. at 519. Since New York had a system of minimum milk prices in effect, the challenged law required payment of the New York minimum price to Vermont farmers if Vermont milk was to be sold in New York. In an opinion by Justice Cardozo, the Court viewed the New York system as "a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported." *Id.* at 521. The Court said that "commerce between the states is burdened unduly when one state regulates by indirection the prices to be paid to produc-

ers in another." *Id.* at 524. The defect in *Baldwin* was that the New York scheme was "equivalent to a rampart of customs duties." See *Limbach*, 486 U.S. at 275 (quoting *Baldwin*, 294 U.S. at 527).

Another opinion by Justice Cardozo limits the principle set forth in *Baldwin*. *Henneford*, 300 U.S. 577. Viewing the *Baldwin* case as originating in facts that were "far apart" from an evenhanded Washington state use tax, the Court expressly distinguished its earlier decision:

> New York was attempting to project its legislation within the borders of another state by regulating the price to be paid in that state for milk acquired there. She said in effect to farmers in Vermont: your milk cannot be sold by dealers to whom you ship it in New York unless you sell it to them in Vermont at a price determined here. What Washington is saying to sellers beyond her borders is something very different. In substance what she says is this: You may ship your goods in such amounts and at such prices as you please, but the goods when used in Washington after the transit is completed, will share an equal burden with goods that have been purchased here.

Henneford, 300 U.S. at 585-86.

The Milk Order creates a system like the Washington use and sales tax scheme upheld in *Henneford*. Under the Milk Order, out-of-state farmers may ship milk "in such amounts and at such prices" as each farmer pleases, subject to federal pricing regulation. Milk that is consumed in Massachusetts will, even if produced out-of-state, "share an equal burden with goods that have been purchased here." It follows that *Baldwin* does not govern here, and that *Henneford* validates the Milk Order.

From an economic perspective, as well, the Milk Order does not establish extraterritorial prices. The Milk Assessment is calculated independently of the prices paid to out-of-state farmers and does not even attempt to regulate the out-of-state purchase and sale transaction at all.[32] Subject only to federal limits, an out-of-state farmer with a price or other advantage "belonging to the place of origin" (*Baldwin*, 294 U.S. at 527) may exploit that advantage fully by raising or lowering its price. See Varat, *supra*, 48 U. Chi. L. Rev. at 543. Unlike most "prices," the Milk Order makes refunds available if the receipts exceed the disbursements in the Subsidy program. The Assessment is imposed only upon the milk dealer and, as such, constitutes what the Supreme Judicial Court correctly called "one of the costs of doing business in the Commonwealth, a cost all milk dealers must pay." 415 Mass. at 19, 611 N.E.2d at 245 (J.A. 130).

Costs of business arising from many sources (including some state-mandated costs such as corporate franchise taxes, mandatory insurance, and the like) cannot tenably be characterized as "prices" within the meaning of *Baldwin*.[33] See *id.* at 16, 19, 611 N.E.2d at 243, 245 (J.A. 128, 130). Unless the Commerce Clause is expanded beyond containable bounds, a mere increase in cost

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[32] In addition, if any price is involved, it is an *in-state price paid by the State*, not by the dealer. Where the Subsidy is concerned, only the State "has entered into the market itself to bid up [the] price," and therefore only the State is the "purchaser" to the extent of the Milk Subsidy. *Alexandria Scrap*, 426 U.S. at 806, 808. See above, pp. 22-23.

[33] The petitioners (Pet. Br. at 13, 30) make much of the Commissioner's statement that the "Order sets a target minimum price" (J.A. 32), but the statement signifies only that the Order is within the Commissioner's broad state law authority to regulate "prices, terms and conditions relative to milk" under Mass. Gen. Laws c. 94A, §§ 10, 11. That facet of state law has nothing to do with Commerce Clause extraterritoriality issues.

that results from state mandates cannot be equated with the extraterritorial price regulations at issue in *Baldwin* and *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U.S. 573 (1986). See above pp. 27-28. In particular, an assessment upon consumption—like "a tax upon use"—"is not a clog upon the process of importation at all, any more than a tax upon the income or profits of a business." See *Henneford*, 300 U.S. at 586.

Finally, any attempt to equate the Order with out-of-state prices fails as a factual matter. The federal minimum prices depend primarily on the price of manufacturing grade milk sold in Minnesota and Wisconsin, not upon the price at which milk is sold in Massachusetts. See 7 C.F.R. § 1001.51 (determining "basic formula price" relied on in calculations under § 1001.50 and other provisions of Federal Milk Marketing Order No. 1). Any factual argument regarding effects on premium prices (payments by dealers in excess of the federal minimum)[34] was rejected below. 415 Mass. at 17 & n.13, 611 N.E.2d at 244 & n.13 (see J.A. 88-89, 95-96, 128 & n.13).[35] Even if true, a re-

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[34] No reason appears why the dormant Commerce Clause would mandate preservation of premium prices above the federal minimum, when Congress has decided to leave premium pricing federally unregulated. *Cf. United Dairy Farmers Coop. Ass'n* v. *Milk Control Comm'n of Pennsylvania*, 335 F. Supp. 1008, 1014-15 (M.D. Pa.) (three judge court) (state prices above federal minimums not preempted by Agricultural Marketing Agreement Act of 1937, as amended), aff'd, 404 U.S. 930 (1971); *Crane* v. *Commissioner of Dep't of Agriculture, Food & Rural Resources*, 602 F. Supp. 280, 290-93 (D. Me. 1985) (same). See also *Stark* v. *Wickard*, 321 U.S. 288, 291 (1944).

[35] The petitioners conceded in their brief in the Supreme Judicial Court that "it is unnecessary to explore the differences between the Zone 21 price and the market price." Brief for the Plaintiffs-Appellants at 6 n.4 (Mass. SJC No. 6140). Despite the facts found in this case, *Amici MIF, et al.*, attempt to (continued...)

duction in premium payments caused by increased costs to dealers due to the Milk Assessment would be the lawful effect of an evenhanded assessment upon all milk consumed in Massachusetts. Increased costs do not invalidate evenhanded levies, despite their likely effect upon prices at some level of industry. See above, p. 28.

In short, an assessment upon milk consumed in Massachusetts, followed by a subsidy to Massachusetts farmers is not an extraterritorial price. The Milk Order resembles milk laws that this Court has upheld under the Commerce Clause on the ground that they affect only the essentially local activities of milk sales and production. See *Eisenberg Farm Products*, 306 U.S. at 352-53; *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U.S. 608, 614-15 (1937); *Schwegman Bros. Giant Super Markets* v. *Louisiana Milk Comm'n*, 365 F. Supp. 1144, 1156 (M.D. La. 1973) (three judge court), aff'd, 416 U.S. 922 (1974); *United Dairy Farmers Coop. Ass'n* v. *Milk Control Comm'n of Pennsylvania*, 335 F. Supp. 1008, 1014 (M.D. Pa.) (three judge court), aff'd, 404 U.S. 930 (1971).

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[35](...continued)
explore the matter through hypothetical examples that would apply equally to the use tax in *Henneford* (*MIF Amicus* Br. at 6, 20) or that prove nothing more than that the Assessment is a cost to the dealer and that the Subsidy generates added revenue for Massachusetts farmers (*MIF Amicus* Br. at 23).

II. THE BENEFITS OF THE MILK ORDER OUTWEIGH ANY BURDEN UPON INTERSTATE COMMERCE.

While the Supreme Judicial Court afforded petitioners the benefit of the *Pike* balancing test (above, pp. 11-12), there is no occasion for application of this test at all. The Milk Assessment, as a non-discriminatory measure applied to in-state milk consumption, easily passes the *Complete Auto Transit* test (see 430 U.S. at 279, 285, 287), which does not include *Pike* balancing. See *Commonwealth Edison*, 453 U.S. at 625-26; *Department of Revenue of Washington* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734, 746-47, 750-51 (1978). See also, Tribe, *American Constitutional Law*, § 6-15 at 441 (2d ed. 1988). The Milk Subsidy is lawful because subsidies are not "the kind of action with which the Commerce Clause is concerned," *Alexandria Scrap*, 426 U.S. at 805, without regard to *Pike* balancing. The same analysis should apply to use of a dedicated revenue fund. Perhaps implicitly recognizing the inappropriateness of balancing in this case, the petitioners' brief (Pet. Br. at 31-33) does not really engage in balancing at all, apart from a discussion of possible alternatives the Commonwealth might have chosen. See below, pp. 41-42.

In any event, the prior sections of this brief show that, given the lawful purpose of the Milk Order to prevent the collapse of Massachusetts' dairy farming industry, any burden on commerce is merely "incidental and not forbidden by the Constitution." See *Eisenberg Farm Products*, 306 U.S. at 353. While the State's interests in protecting the Massachusetts dairy industry from collapse and in protecting unique open space and related benefits were established, the petitioners simply failed below to prove substantial effects upon commerce within the meaning of the Commerce Clause. See above, pp. 9-10. Often, in Commerce

Clause litigation, "constitutionality is conditioned upon the facts." *Raymond Motor Transportation, Inc.* v. *Rice*, 434 U.S. 429, 447-48 n.25 (1978) (quoting Dowling, *Interstate Commerce and State Power*, 27 Va. L. Rev. 1, 27-28 (1940)). This is certainly true where, as here, petitioners claimed that the Milk Order would have certain economic effects, which were not proven as a matter of fact. The petitioners have waived or been unsuccessful in state court in any attempt to attack the fact findings, see above pp. 11-12; and this Court does not sit to review facts found by state officials and courts. See *Clover Leaf Creamery*, 449 U.S. at 463 n.7, 471 n.15. *Cf. Maine* v. *Taylor*, 477 U.S. 131, 144-45 (1986) (even in federal court, fact finding is for the trial courts).

The analysis of the effects of the Order undertaken by petitioners and their *amici* demonstrate nothing more (and, on the facts as found, considerably less, see above, p. 24) than the sum of the usual effects of an evenhanded assessment plus the effects of an in-state subsidy. As the Supreme Judicial Court held, the Assessment increases the costs of doing business in Massachusetts and the Subsidy aids Massachusetts farmers, but neither of these effects constitutes an undue burden upon commerce.

The petitioners also do not demonstrate why their proposed alternatives would have any less effect upon commerce. Several alternatives (subsidies from the general fund or various forms of tax relief) might have less impact upon the petitioners themselves, but not "a lesser impact on interstate activities." *Pike*, 397 U.S. at 142. See *Exxon*, 437 U.S. at 127-28.[36] Other alterna-

[36] The petitioners' tax relief suggestion would have a lesser effect on commerce only in the trivial and immaterial sense that all purely local tax measures (such as a real property tax) affect interstate commerce less than lawful, evenhanded assessments upon both in-state and out-of-state residents.

(continued...)

tives (aid to research or in-state minimum prices) are "unproven means of protection," *Taylor*, 477 U.S. at 147, and are "less likely to be effective." *Clover Leaf Creamery*, 449 U.S. at 473.

In sum, any alleged "burden" on commerce due to the absence of a subsidy for out-of-state farmers is outweighed by the "local benefits" of preserving the Massachusetts dairy industry. Massachusetts is not compelled to surrender the character and industry of its rural areas in the interest of any clearly overriding policy set forth in the Commerce Clause, for no such federal policy exists.

Conclusion.

The judgment of the Supreme Judicial Court of Massachusetts should be affirmed.

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Dated: December 14, 1993

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[36](...continued)
See Note, *State Taxing Schemes Discriminating in Violation of the Foreign Commerce Clause: Kraft General Foods, Inc. v. Iowa Department of Revenue and Finance*, 46 Tax Lawyer 555, 563 & text at n.66 (1993).